

STATE OF MICHIGAN
COURT OF APPEALS

In re KLEKOTKA, Minors.

UNPUBLISHED
September 15, 2016

No. 331480; 331481
Kent Circuit Court
Family Division
LC Nos. 14-053320-NA;
14-053321-NA

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In Docket No. 331480, respondent mother appeals as of right the January 14, 2016 order terminating her parental rights to the minor children, WK and CK, under MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist) and (g) (failure to provide proper care and custody). In Docket No. 331481, respondent-father appeals as of right the January 14, 2016 order terminating his parental rights to WK and CK under MCL 712A.19b(3)(a)(ii) (desertion of child for 91 or more days without seeking custody) as well as MCL 712A.19b(3)(c)(i) and (g). In both cases, we affirm.

I. DOCKET NO. 331480

Mother challenges the termination of her parental rights on several grounds. “In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met.” *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court’s factual determination for clear error. *Id.* A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). This Court gives deference to “the trial court’s special opportunity to judge the credibility of the witnesses.” *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

The trial court terminated mother’s parental rights under MCL 712A.19b(3)(c)(i) and (g), which state as follows:

(3) The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Only one statutory ground need be established to support termination. *In re HRC*, 286 Mich App at 461. Termination is proper under MCL 712A.19b(3)(c)(i) when “the totality of the evidence amply support[s] that [the respondent] ha[s] not accomplished any meaningful change in the conditions” that led to the adjudication. *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009).

Mother first argues that the trial court erred by finding that the conditions that led to the adjudication, i.e., mother's substance abuse and improper supervision of the children, continued to exist such that termination of mother's parental rights was proper under MCL 712A.19b(3)(c)(i). At the adjudication hearing, mother admitted that she exhibited drug seeking behaviors, abused substances including prescription drugs, and used her prescription drugs at inconsistent levels. Mother also admitted that on various occasions she improperly supervised and neglected her children. Testimony at the termination hearing revealed that mother continued to abuse prescription and non-prescription drugs, including cocaine, despite the many services offered to her to overcome the substance abuse, such that her ability to parent her children was compromised. Though mother made some efforts to rectify the substance abuse issues that resulted in the adjudication, the totality of the evidence supports the trial court's finding that those efforts did not result in a meaningful change in mother's substance abuse such that termination was improper. *In re Williams*, 286 Mich App at 272.

Although mother argues that the trial court erred by finding that the substance abuse could not be rectified in a reasonable timeframe, testimony at trial supported the trial court's conclusion that after two years of counseling mother had made only minimal progress toward achieving her goals of reunifying with her children and staying clean from drugs. Mother's substance abuse counselor testified that additional counseling time and treatment would not make a difference in mother's ability to parent or her substance abuse. Indeed, despite the extensive services mother received over a three-year period, the evidence shows that she continued to regularly miss drug screens, and the drug screens she did complete regularly demonstrated continued substance abuse. Thus, the trial court did not err by finding that there was no reasonable likelihood that mother's substance abuse would be rectified in a reasonable time. See *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991) (stating that “the

Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time.”).

Mother also claims that the trial court erred by finding (1) that she did not rectify her improper supervision and neglect of the children and (2) that there was no reasonable likelihood that the problems would be rectified in a reasonable time. As with the substance abuse issue, the evidence suggests that mother made some progress in some areas of her parenting skills during the pendency of the case. However, several caseworkers testified that despite years of expansive and intensive services, mother remained unable to properly supervise the children. The testimony by each of the witnesses who worked with mother indicated that despite mother’s efforts, her ability to supervise her children remained deficient and there was no reasonable likelihood that she could further improve. This evidence supported the trial court’s conclusions.

At the time of the termination hearing, five-year-old WK and four-year-old CK had spent nearly 15 months in foster care and mother continued to have substance abuse and supervision problems such that she was unable to parent them. Testimony before the trial court revealed that mother’s improvement in these areas plateaued at a level well below that necessary for her to adequately parent her children and that there was no expectation mother could rectify those problems. Therefore, the trial court did not err by finding that the conditions that led to the adjudication remained and that there was no reasonable likelihood that the problem could be rectified in a reasonable time, such that mother’s parental rights should be terminated. *In re Williams*, 286 Mich App at 272; see also *In re Powers Minors*, 244 Mich App 111, 119; 624 NW2d 472 (2000) (finding that the trial court did not err in terminating the respondents’ parental rights when despite “time to make changes and the opportunity to take advantage of a variety of services, the conditions that originally brought the children into the foster care system still existed” and “[t]here was no evidence that [respondents] would be likely to rectify these conditions”).

We likewise reject mother’s argument that the trial court erred by finding that there was no reasonable expectation that mother would be able to provide proper care and custody of the children within a reasonable time. MCL 712A.19b (3)(g). As we concluded earlier in relation to subsection (3)(c)(i), mother was unable to provide proper care or custody of her children due to her substance abuse and improper supervision and neglect of the children. The record demonstrates that mother participated in years of extensive services and that mother seemed to genuinely desire to be able to provide proper care and custody of her children, but was simply unable to do so.

According to mother, the Department of Health and Human Services (DHHS) did not properly address her physical and mental health needs and did not provide sufficient evidence of her health needs, meaning that the trial court could not properly conclude that there was no reasonable likelihood that mother would be able to provide for the proper care and custody of the children within a reasonable time. Mother’s physical and mental health was certainly a concern in this case, and for that reason mother received mental health counseling, substance abuse counseling, and two psychological evaluations. Testimony before the trial court indicated that mother was instructed to see her primary care physician to discuss concerns regarding her memory and mental health. However, mother had several different primary care physicians

during the pendency of the case, and she changed physicians for a variety of reasons, including that they were too far away, or she did not like the office, or she wanted to switch offices. Because of mother's inability to establish a primary care physician or control her substance abuse, the extent to which mother's barriers to reunification with her children were affected by her health concerns as opposed to her substance abuse issues, remained somewhat unclear. However, the testimony before the trial court supported that there was no expectation that mother was capable of providing proper care or custody of the children in any length of time, let alone a reasonable time considering the age of the children. Therefore, the trial court did not err by finding that mother would not be able to provide proper care and custody of her children within a reasonable time such that termination of mother's parental rights was proper under MCL 712A.19b(3)(g). See *In re Dahms*, 187 Mich App at 647.

Mother next claims that the trial court erred in finding that DHHS made reasonable efforts to rectify the conditions that led to the children's removal from the home because there was a lack of referrals to evaluate and address mother's physical and mental health issues and a lack of evidence presented regarding services offered to mother. Because mother did not assert the need for additional services during the adoption and implementation of the service plan and did not indicate in the trial court that the services provided to her were somehow inadequate, her argument is unreserved. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Thus, we review only for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Generally, "[w]hen a child is removed from a parent's custody, the agency charged with the care of the child is required to report to the trial court the efforts made to rectify the conditions that led to the removal of the child." *In re Plump*, 294 Mich App 270, 272; 817 NW2d 119 (2011). "The adequacy of the petitioner's efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich 73, 89; 763 NW2d 587 (2009). "Before the trial court enters an order of disposition, it is required to state whether reasonable efforts have been made to prevent the child's removal from the home or to rectify the conditions that caused the child to be removed from the home." *In re Plump*, 294 Mich App at 272. However, while DHHS "has a responsibility to expend reasonable efforts to provide services to secure reunification," there is a "commensurate responsibility" for the parent to participate in and benefit from the services provided. *In re Frey*, 297 Mich App at 248.

According to mother, reasonable efforts were not made because there was a lack of referrals to evaluate and address her physical and mental health issues and a lack of evidence presented regarding services offered. However, the record demonstrates that mother received a myriad of services during the years of agency involvement in this case. These included services provided through Families First, Advanced Impact, psychological evaluations, a substance abuse evaluation, random drug screens, the Arbor Circle Infant Toddler Program, Arbor Circle Substance Abuse Services, Family Outreach Mental Health Services, the Alpha Women's Center Parenting Class, and provision of safety locks for her doors and a locked box for her medications. While mother claims referrals should have been made regarding her physical health, the record reflects that she was regularly instructed to consult her primary care physician regarding health concerns and possible memory issues associated with her health. Mother told a caseworker that she was going to see a doctor, but either did not do so or did not inform the caseworker that she did so. Mother also consistently refused to establish and maintain a primary

care physician, instead apparently bouncing between various physicians. Similarly, the record reflects that although mother was provided with years of substance abuse counseling and mental health counseling, mother failed take advantage of the services provided to her and did not pursue additional opportunities offered to her.

Mother's own failure to take advantage of the services provided to her, particularly her failure to meaningfully address her substance abuse problems and her failure to maintain and work with a primary care physician, inhibited the reasonable efforts that were provided on her behalf. Mother had a responsibility to take advantage of the services provided to her, and her failure to do so does not mean that reasonable efforts were not taken to rectify the conditions that led to the children's removal. *In re Frey*, 297 Mich App at 248. Therefore, the trial court did not plainly err by finding that reasonable efforts were made to rectify the conditions that led to the children's removal. *In re Utrera*, 281 Mich App at 8.

Finally, mother argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court's finding regarding best interests is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). In determining whether termination is in a child's best interests, the focus is on the child, not the parent. *In re Moss*, 301 Mich App at 88. The trial court may consider any evidence within the whole record to determine whether termination is in the child's best interests, and the trial court must state its finding and conclusions regarding any best interest's evidence on the record or in writing. *In re Trejo*, 462 Mich at 356. "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). The trial court may also consider whether it is likely that the child could be returned to the parent's home in the foreseeable future, *In re Frey*, 297 Mich App at 249, and whether the child is not safe with the parent and is thriving in foster care. *In re VanDalen*, 293 Mich App at 142.

The evidence proved that mother was bonded with her children, that she did improve in some ways in her ability to parent the children, and that she made some improvements regarding her substance abuse problems. However, the testimony before the trial court also indicated that mother reached a point at which she stopped improving, there was no expectation that she could improve any further, and she remained well below the minimum threshold necessary for her to be able to safely and successfully parent the children because of her continuing issues with substance abuse and improper supervision. Mother's continued inability to parent the children supported the trial court's finding that termination was in the children's best interests. *In re Olive/Metts Minors*, 297 Mich App at 41-42.

Furthermore, evidence suggested that when the children were removed from mother's care, they exhibited significant developmental delays, especially in their speech. While in foster

care, the foster parents pursued services to help the children develop their speech, and caseworkers reported that the children showed significant improvement in response to those services. The children's thriving in foster care also supported the conclusion that termination was in their best interests. *In re VanDalen*, 293 Mich App at 142; see *In re LE*, 278 Mich App 1, 29; 747 NW2d 883 (2008) (finding that even though the children were bonded with the mother and would experience grief and loss if the mother's parental rights were terminated, they would be able to overcome that loss and would then be able to achieve stability and permanence). Therefore, we do not have a definite and firm conviction that a mistake has been made, meaning that the trial court did not clearly err by finding that termination of mother's parental rights was in the best interests of the children. *In re Mason*, 486 Mich at 152.

II. DOCKET NO. 331481

Father argues that the trial court clearly erred by failing to provide him with additional time to participate in a treatment plan because more diligent efforts to locate and provide him services should have been made. We review this unpreserved argument for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8. As stated earlier, DHHS had a duty to make efforts to rectify the conditions that led to the removal of the children. *In re Plump*, 294 Mich App at 272. According to father, the trial court violated the rule expressed in *In re Mason*, 486 Mich at 160, that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination."

The trial court did not commit error, let alone plain error. The evidence established that father chose not to participate in the proceedings. Indeed, father was almost completely absent throughout the course of the proceedings. At the termination hearing, the only hearing at which he was present, father admitted that he had not visited the children for over a year, admitted that he knew he had an attorney for this case but never attempted to speak with him, admitted that he did not pay child support, and admitted that he did not do any work on a treatment plan. The record reflects that father was not incarcerated until October 7, 2015, at which time the children had been in care for over a year and the sum total of father's involvement in the case was his attendance at a single meeting on December 2, 2014, regarding WK's education. Father failed to participate despite extensive efforts by DHHS to facilitate reunification efforts. During the pendency of the case, five different intake interviews were scheduled, each of which father cancelled or failed to attend. Additionally, there were extended periods of time during which father was not reachable by phone and DHHS was unable to locate him.

Under these circumstances, DHHS clearly met its responsibility to expend reasonable efforts to provide father with services, and it was father's failure to participate in and benefit from the services provided to him that resulted in the termination of his parental rights. *In re Frey*, 297 Mich App at 248. Therefore, the trial court did not plainly err by finding that reasonable efforts were made to rectify the conditions that led to the children's removal. *In re Utrera*, 281 Mich App at 8.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Jane M. Beckering